In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1639

WILLIAM M. BROADRICK, JIMMY R. URY, and CLIVE R. RIGSBY, for themselves and for the Class, "Classified Employees Within the Classified Service of the State of Oklahoma,"

Appellants,

VERSUS

THE STATE OF OKLAHOMA, EX REL. THE OKLAHOMA STATE PERSONNEL BOARD, and its members; THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, and its members; and LARRY DERRYBERRY, Attorney General of the State of Oklahoma,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

MOTION TO AFFIRM

LARRY DERRYBERRY
Attorney General of Oklahoma
PAUL C. DUNCAN
Assistant Attorney General
Chief, Civil Division
Counsel for Appellees

July, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY. PH. 235-0036

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Comes now the appellees, the State of Oklahoma, *ex rel.* The Oklahoma State Personnel Board, and its members; and Larry Derryberry, Attorney General of the State of Oklahoma, and request this Court to affirm the ruling of the three-judge United States District Court for the Western District of Oklahoma whereby the court refused to enjoin Oklahoma's statutes prohibiting partisan political

activity on the part of certain State employees, and denied all relief sought by plaintiffs. The District Court's opinion is set out in full in the Appendix of the Jurisdictional Statement of appellants.

STATEMENT OF FACTS

Appellees are in substantial agreement with the sequence of events set forth in appellants' Jurisdictional Statement. With respect to that portion of the Jurisdictional Statement contained on page seven, appellees disagree that the three-judge Court had to narrowly construe the Act to prohibit only partisan "party" political activities in that the Act itself is narrowly drawn to convey the interpretation that partisan political activity alone is prohibited, the term "partisan politics" connotating party politics. With that exception, appellees are in agreement that the Jurisdictional Statement correctly reflects the Opinion of the three-judge Court filed on February 14, 1972. Appellees further stipulate that the Appendix is an accurate reproduction of the opinions, judgments and law which they purport to depict and the same are hereby adopted by the appellees, as a basis for this Court sustaining this Motion to Affirm.

ARGUMENT

This District Court's opinion found that the Oklahoma Legislature has the power to regulate, within reasonable limits, the political conduct of State employees in order to promote efficiency and integrity in the public service. In regulating said conduct provisions safeguarding State employees from the evils of political partisanship by provid-

ing prohibitions against involvement in partisan politics constitute a compelling governmental interest sufficient to justify some encroachment upon an individual's First Amendment rights. The District Court found that Oklahoma's prohibitions against partisan political activity were drawn so as to prohibit only those political activities relating to party politics. The questions presented by appellants in their Jurisdictional Statement relate to the wording of the statute and the fact that not all State employees are subject to the restrictions. Both of the questions presented will be briefly discussed.

PROPOSITION I

TITLE 74 O.S. 1971, §818, IS NARROWLY DRAWN TO PROHIBIT ONLY THOSE POLITICAL ACTIVITIES RELATING TO PARTY POLITICS.

The first question presented in appellants' Jurisdictional Statement concerns the wording of Section 818. Appellants assert the statute is broadly drawn to prohibit both partisan and non-partisan political activity. The District Court properly found this contention to be insubstantial both in fact and in law. See Findings of Fact 9-11, Jurisdictional Statement viii; Conclusions of Law 9, Jurisdictional Statement x. Appellants do not argue so much that the language is overbroad as they do that the Hatch Act, and the *Mitchell* case upholding it, no longer square with later civil rights decisions. The District Court correctly stated that an inferior court can never "erode" a decision of the United States Supreme Court. See Conclusions of Law 11, Jurisdictional Statement xi.

The key concepts in prohibiting partisan political activity on behalf of State employees are that the promotion, protection and preservation of the efficiency and integrity of the public service constitutes a compelling State interest and that partisan political activity by civil servants is a direct and viable threat to an efficient and honest public service. *Gray* v. *City of Toledo*, 323 F.Supp. 1281 (1971). In applying these concepts as the rationale behind the language, together with the language itself, there can be no doubt that the prohibitions are limited to partisan political activity. The use of the words "political" and "politics" can refer to "the science of government and civil polity," or be used in the narrower sense of referring to "political affairs in a party sense." In enacting statutes of this nature it is clear that the words "politics" and "political" are used in the narrower sense of referring to "political affairs in a party sense." In addition, where the words "politics" and "political" are modified by an adjective that connotes partisanism, the restricted activity is non-protected speech under the guidelines set forth by this Court in *United Public Works of America* v. *Mitchell*, 330 U.S. 75, 67 S.Ct. 456, 91 L.Ed. 754 (1947). *Gray* v. *City of Toledo, supra*. The purpose and intent of enacting such a statute prohibiting political activity on the part of State employees is to safeguard against the evils of political partisanship. In looking at the purpose of a statute this Court has held for the proposition that:

> "We should give the language a meaning if the words will bear it, which carries out the purposes of the statute, even though this is not the literal meaning of the words when considered in isolation." *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 60

S.Ct. 1059, 84 L.Ed. 1345 (1941); *United States* v. *Shirey*, 359 U.S. 255, 79 S.Ct. 746, 3 L.Ed.2d 789 (1959).

Again, in *Richards* v. *U. S.*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962), this Court said:

> "We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole act, and that in fulfilling our responsibility in interpreting legislation, we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and its object and policy."

See *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 100 L.Ed. 309, 76 S.Ct. 349 (1956); *United States* v. *Boisdore's Heirs* (U.S.), 8 How. 113, 12 L.Ed. 1009.

Section 818 of the Oklahoma Merit System of Personnel Administration does not prohibit State employees from participating in non-partisan political activities and does not restrict public and private expressions on public affairs and personalities, not an objective of party action, so long as the employee does not channel his activity towards party success. Appellants rely heavily on the recent case of *Hobbs* v. *Thompson*, 448 F.2d 456, wherein the Court makes no attempt to distinguish *Mitchell*, but states that *Mitchell* is no longer the law, even though this Court has not ruled on the question since *Mitchell*. Appellees contend that *Mitchell* is the law, that the inferior court decisions relied upon by appellants have not eroded that decision of this Court, and that the rationale behind the decision in *Mitchell* is as valid today as when rendered.

PROPOSITION II

PLAINTIFFS ARE NOT DENIED THE EQUAL PROTECTION OF THE LAWS.

Appellants contend that they are denied the equal protection of the law in that they are denied the rights granted to all other citizens without justification for the distinction. As stated by the Court in *Bagbey* v. *Washington Township Hospital Dist.*, 421 P.2d 409 (Cal. 1966):

> "The governmental employee should no more enjoy the right to wrap himself in the flag of constitutional protection against every condition of employment imposed by the government than the government should enjoy an absolute right to strip him of every constitutional protection. Just as we have rejected the fallacious argument that the power of government to impose such conditions knows no limits, so must we acknowledge that government may, when circumstances inexorably so require, impose conditions upon the enjoyment of public-conferred benefits despite a resulting qualification of constitutional rights."

The right of the State to prohibit the political activities of State employees has long been upheld. The Court in *Mitchell, supra,* explained it thusly:

> "We have said that Congress may regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the general existing conception of governmental power. That conception develops from practice, history, and changing edu-

cational, social and economic conditions. The regulation of such activities as Poole carried on has the approval of long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion. Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional."

The Equal Protection Clause does not require exactly equal treatment of all citizens. The Legislature may create certain classes and make laws applicable to some but not all of the classes, provided that the principle of classification rests upon some real difference which bears a reasonable and just relation to the ends sought to be accomplished by the legislation. The line between the classified and unclassified civil service coincides with the classification of ministerial and policy-forming public officers, and policy-forming public officers should reflect the popular will and to do so must engage in politics, but ministerial employees have nothing to do with forming public policy and are best able to perform their activities when separated from the uncertainties of political influence, which require that they be forbidden to take a public and prominent part in the activities of political parties and in election campaigns.

The evils of partisan politics in State government balanced against the political rights of State employees as citizens require the regulation of the political conduct of State employees in order to promote efficiency and integ-

rity in the public service. The District Court properly found that appellants' Fourteenth Amendment rights were not violated. See Conclusions of Law 4, Jurisdictional Statement ix.

CONCLUSION

The lower court properly adhered to all constitutional principles governing prohibitions against State employees being involved in partisan politics. It must be remembered that the requirement placed upon a court of three judges while entertaining a suit to enjoin enforcement of a State statute is to insure that the statute shall not be suspended by injunction except upon a clear and persuasive showing of unconstitutionality and irreparable injury. *Mayo* v. *Lackland Highlands Canning Company*, 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774 (1940).

The findings of fact and conclusions of law of the lower court indicate no persuasive showing to support any of the complaints raised by appellants. All issues raised were properly decided by the lower court. Accordingly, a full hearing of this case, including briefs and oral argument, is not necessary to a proper decision by this Court. Appellees respectfully request that the judgment of the District Court be affirmed.

Respectfully submitted,

LARRY DERRYBERRY
Attorney General of Oklahoma

PAUL C. DUNCAN
Assistant Attorney General
Chief, Civil Division
Counsel for Appellees

July, 1972

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing instrument, were served upon:

Mr. Terry Shipley
119½ South Third Street
Noble, Oklahoma 73068

Mr. John C. Buckingham
Suite 1213
100 Park Avenue Building
Oklahoma City, Oklahoma 73102

Counsel for Appellants

all parties required to be served, by mailing such true and correct copies, postage prepaid, this _____ day of July, 1972.

_____

Paul C. Duncan